



Liberal Democrat Lawyers Association: The 80 Club Annual Lecture

SO WHAT: Press Regulation Today

Monday 13 June 2016

It is customary for the speaker or lecturer to express gratitude to the hosts for the invitation to talk and cast some garland of appreciation of the honour etc. etc. to the audience...a sweetener if you like. Nor would that be inappropriate for me with perhaps a longer line of ancestors who have been members of the dear old NLC - both my father and grandfather – and in the days when, as a young barrister, I was not engaged, or at least not wholly engaged, in flitting between Clerkenwell Magistrates' Court in the morning for a careless driving and Camberwell Green Magistrates' Court in the afternoon for a series of grubby kitchen summonses...usually in the wrong order so that I was late for both...I would have lunch in the billiard room downstairs here while my father beat me at snooker and cold coffee and sandwiches were served by a lugubrious member of the staff of this club.

But I am not at all sure that that custom is appropriate here tonight and you will forgive me if my gratitude is mooted. Permit me to explain why. Chairmen of organisations, associations, what you will, are generally expected to blow, if not their own trumpet, at least the trumpet of those over whose affairs they preside...they should, generally exude confidence at job well done, an account of past satisfaction with suitably mooted reference to what they call challenges rather than disasters, and issues rather than problems. And if the smugness of their tour of a sunlit horizon is not enough to indicate the brightest of futures, they will indicate the likelihood of happy tomorrows. If, like the President of the Supreme Court, the future is clouded in the obscurity of a funding fog they can at least, guided by those officials always ready to lend a willing hand to the drafting of the judicial speech, exhibit a worthy intent.

Now I am sorry to disappoint you...but I don't feel that it would be wise to express an excess of gratitude, and though all too conscious of the honour I fear it may be accompanied not so much with a fanfare but rather the grating sound of the grindstone as the knives are sharpened. In short, I am fearful...the slightest hint of triumph of the suggestion that all is going well at the Independent Press Standards Organisation is likely to be met with an inevitable nemesis as the first editions appear, and too strong a defence of what it is we are doing and what we seek to achieve will be met with the all too ready accusation of being over-defensive.

Indeed, in the questioned and questionable area of press regulation a lecture on the subject is itself if not a hostage, at the least a potential target, to fortune. Why should that be? It is, I suggest, because a lecture about what an organisation is achieving, what difference it is making and for what goal it aims should be clear and direct. But the more I live with an IPSO that is working daily, the more I take a vicarious pride in the duties its staff perform for members of the public the more the questions arise, the more the problems I want to debate and air and the less easy I feel the solution to be. I could, in reality, spend my time posing questions and expressing puzzlement...do not think for one moment that I lack faith, not at all, but it is faith and not its antonym certainty that I want to discuss tonight in raising the question my title raises: So What?...what function does IPSO serve, and lest that be thought question-begging, lest it be thought to be answering the very question it poses...does it serve a function?

It is as well to set out, in a broad sense, its purpose: to protect the public from abuse...the abuse of inaccuracy and distortion, the abuse of intrusion or invasion into personal dignity and of harassment.

And in striving to achieve that purpose IPSO certainly works day in and day out as a regulator in its daily dealings with the vast majority of the press in its printed and online versions what 85 publishers, over 1,100 print titles, 1,500 websites and 90% of national newspapers measured by coverage, almost all local newspapers and all the major magazine publishers publish daily.

In 2015 we received 12,276 inquiries, but only a third of these could possibly have formed the basis of a finding that the Code had been breached...complaints that the colour supplement had not been delivered, whilst deeply felt, were outside our

jurisdiction and it is somewhat dispiriting to have to send the by no means miniscule numbers of complaints about the Guardian back to the Guardian.

In 2015, 45 complaints were upheld and 61 resolved to the satisfaction of the complainant with the help of IPSO's mediation between publication and complainant...a total of 106 compared to the 2,137 complaints found not to have been in breach...201 were resolved directly with a publication. Between January and May 2016 we received 2,747 complaints – I prefer to call them contacts since many fall outside any possibility of coming within our jurisdiction – of which at 13 May 199 were still receiving consideration, a quarterly report is sent to our Board and independently reviewed...we are able to break the complaints down into clauses as identified in the Editors' code and against which publication, and our independent reviewer, assesses the quality of our reasons for upholding or rejecting and reports to our Board with recommendation for improvement.

There is a danger in a misleading focus on numbers. The number of complaints upheld, as opposed to rejected, used, in a superficial way, to be used as some measure of success...it is nothing of the sort.

It has become clear that there has been a dramatic improvement in the time it takes for a newspaper to deal with and resolve a complaint with a member of the public. The newspaper has a maximum period of 28 days to attempt to resolve a complaint of breach of the Code; in the days of the PCC where there was no fixed time limit, when the PCC had no powers enforceable in a court of law, and was owed no legally enforceable obligations by the newspapers, publications believed that they had only to obfuscate and draw out the complaint for it finally to go away. Time, and delay, as they have now learnt, merely corrode and gnaw away at the public's grievance...speedy resolution on the other hand can bring a welcome and not oppressive satisfaction.

It is also important not to overlook the extraordinary power, a power that has never before been available, a power that it is easy to overlook. That is the power to dictate what correction should be published, the words which should be used, where the correction should be put and how it should be presented, in what font size and with what headline. We have, in the past, not always got it right...we failed to specify font size when we compelled a correction to a particularly foul set of insults to a

parliamentary candidate by Rod Liddle in the Sun...when he tried to correct it he only made it worse and the final correction was too small.

But we are learning our lessons and when we are told that our eleven front page notices of correction are inadequate it is as well to recall that never before have there been any front page corrections *dictated* by a regulator...ever. For the first time newspapers are required under their imprint, under their banner in their daily or Sunday edition, what we the regulator require them to print...the correction is not their story – it is ours. The daily process, still important, still significant and startling, of filling blank pages with stories to complete a newspaper, be it to your taste or not, is subject to compulsory intervention by us at IPSO...a legally enforceable process of regulation.

But if we concentrate too much on the resolution of complaints, we divert attention from the developing functions of the true regulator that IPSO has become. Our standards section receives and scrutinises the annual reports which each publication is required to submit annually. For the first year, September 2014 – December 2014, every publication submitted a report as required. For the following year, January – December 2015, by all save two, not in the national press, have complied; I can't remember their names and they probably wouldn't mean anything to you anyway. We should not forget that this process of accountability with each newspaper required to report to us has not previously taken place. The very fact of having to give an account is novel and is salutary; they are answerable to us for the number and type of breaches, for what they have done to avoid repetition and for their internal structure for dealing with them. They are published and can be found for each publication, large or small, on our website. This is a realistic process of giving account; free from a defensive secretive approach that attack and confrontation in regulation is bound to engender. It is easy to say as an ideal that we would like publication of every allegation of breach, whether upheld or whether settled. But if that was the requirement the incentive to refuse to settle would be paramount, the urge to prevaricate and obfuscate would return and where then would the public be served?

Our Standards section seems to me to exemplify what distinguishes a body which merely deals with complaints, and a proper regulator. Its aim is to draw on our experience of complaints, consider those issues which are of widespread significance and prove most

intractable...the unnecessary identification of trans-gender, the use of language which offends and lacks proper sensitivity, the extent to which the reporting of inquests into a suicide is excessive and in breach of the Code, patterns which require further debate and consideration at meetings between our Standards section, those concerned to protect minorities who wish to explain and protect their interests and representatives of the press. By these means IPSO, through its Standards arm, can provide a growing resource for journalists and those affected by what may often be abusive insensitivity as to how best to treat others with respect and dignity.

Unattended language can be as dangerous as unattended luggage. So often cruelty and the abuse arises out of unimaginative ignorance and the forum our Standards section provides between trans-gender groups, those concerned with youth justice and others who seek to protect minorities who value their difference, provides a powerful means of improving respect and understanding and feeding, with its experience of our work, into improvements in the Editors' Code.

That title forms a suitable post for whipping. The very name *Editors' Code* jars for those who regard most but not all editors as second only to the true pantomime villain, the newspaper proprietor. If it is the Editors who themselves set the standards by which newspapers agree to abide, they must self-evidently, so it is alleged, afford inadequate protection.

In my salad days, when I was green in experience of press regulation, I thought: should not the regulator be in charge of setting the standards? After all, many, if not most of the statutory regulators, doctors, nurses, midwives, vets, lawyers, set the standards and then police them. But that type of regulator is miles away from press regulation which depends not on policing some statutory gateway into entry into a profession, but on the voluntary submission to a set of standards and to a set of rules by which they are to be monitored. There is no profession of journalism or editorship which permits standards of entry or, perhaps more importantly, expulsion.

And so when I started I spoke in Parliamentary Committees of my ambition that no-one should own the Code...that the Committee which considered the standards should not

belong to anyone but responsibility (surely a far better word than ownership) should be shared between IPSO, representing the public, the Editors and journalists. Now I am far less sure. My and the Chief Executive's membership, with David Jessel, all part of IPSO, and two other independent members, gives the opportunity of seeing how it works in practice. There will be a new round of consultation starting, I hope, at the end of this year, since the previous round of consultation which resulted in changes this year was not one in which IPSO, as yet unformed, had participated. The standards cannot be changed without IPSO's consent.

And my experience has made me far more agnostic as to whether there should ever be anything other than the Code of the Editors; it is after all *they* who are responsible for what appears in the newspaper, for the content, the coverage, for what they put in and equally important what they omit, for the taste, the bias, the unfairness, the bullying, and the cruelty, or the persistent investigation in the face of obstruction and protest from the powerful, from the police and from the community representatives (I am thinking of Andrew Norfolk's resolution for four years in the teeth of obstruction at Rotherham), the sympathy, the revelation which can change people's minds and change people's hearts, in short, the tone and taste of the story. It is therefore, perhaps, and please note my continuing uncertainty, appropriate that they should set the standards. If the standards are those for which the Editors are themselves responsible, there is far less room for recalcitrant manoeuvre when IPSO can say "you set the rules, you obey them".

That the Editors themselves set the standards by which they assert they will abide is a manifestation of an essential aspect of this form of regulation. That is, that it is a form of regulation to which the press has *chosen* to submit. It has not been imposed on them, that essential feature is an aspect of what lies at the heart of press regulation as it exists for the time being, that it is the product of *persuasion*, those publishers who have agreed to regulation by IPSO have been persuaded that it is in their interests to do so. It is not imposed from above. I am not so naïf to believe that as a result of some Damascene conversion they have all regarded it as their public duty to do so, but self-interest is after all a feature of self-regulation. And it is worth pausing to consider how self-regulation may come about...it occurs in response to damage which the industry in question perceives will occur to its reputation and its own interests in the absence of

taking steps to regulate itself... It is a response taken in the own interests of the regulated; it arises out of an awareness of interdependence and collective interest in the industry behaving responsibly. Its hallmark is the voluntary choice of an industry to protect its own interests in the face of a perceived threat to those interests. IPSO was created, after all, because the press conceived it to be in its own interest to create this independent regulator.

It is worth contrasting this voluntary submission to self-regulation with the regulation of the professions imposed by statute. Regulation of a professional service illustrates the importance of a common objective, accepted by both the regulator, [the] regulated and the public. Regulation of the professions, medicine or the law, for example, satisfies the needs both of the regulated and those who depend on their professional skill and judgement. From the point of view of the regulated professional the regulator acts as a gateway, preventing, at least in theory, the shyster and the snake-oil salesman from entry, and with the ability to expel those who have revealed such characteristics in their practice. Regulation enhances the reputation of the professional in restricting entry to those who are qualified, disqualifying those who have shown themselves not to be worthy of the name of barrister, solicitor or physician. The patient or client who seeks their professional services has no means of knowing whose abilities are most appropriate to their needs, who is best qualified.

The aims and purposes are clear; a reliable skilled service in which at least in theory the desire to deploy professional skill for the service of the weak and needy is as strong a motive as prosperity. Self-regulation is easier where it operates through the mechanism of licensing, where the cost of being allowed to enter the market is compliance with a set of standards commonly accepted to be necessary to protect the public.

Press regulation is not regulation of a profession; however much the Editors' Code may speak of raising professional standards, however fine and proud some journalists undoubtedly are, it is inescapable, if trite, to observe that journalism is not a profession in a regulatory sense. You cannot be admitted or expelled by a Regulator, however grievous your behaviour. There is no statute or regulation which provides that you may

not call yourself a journalist unless you comply with the entry standards imposed by a regulator approved by statute.

It is important to recognise that where regulation, like press regulation, depends solely on persuading the regulated that it is in their own interests to submit to some form of regulation, the arts of advocacy rather than those of the demagogue are more likely to succeed. I suspect many of you advocates here would agree that you are unlikely to persuade a judge or jury successfully either by vituperation or incessant repetition... Of course you might get up a good row with the judge if you have a jury and a hopeless case or if you have in mind provoking the judge into some unjudicial intervention which you can expose to the Court of Appeal.

But telling the press that what they have agreed to is inadequate, incompetent or worse, may satisfy the critics' sense of outrage but will it achieve the result you want? There is no jury save those few members of the public who are interested and whilst they may pronounce a verdict of guilty they have continued to participate in the very process they may condemn: buying or reading those newspapers which arouse the greatest condemnation. Nor is there a Court of Appeal...I suppose you should cloak Parliament in that guise but I do not detect any wish in any party to introduce a statutory form of licensing: its approach so far has been to attempt, through the costs-shifting provisions of the Crime and Courts Act, to drive the newspapers into the arms of the Press Recognition Panel, the body designed to assess the qualities of a regulator. It proposes to do so by measuring the regulator according to a series of criteria which they devised, after consultation in which IMPRESS, the only body to seek recognition, enthusiastically participated, culminating in a series of recommendations with which only IMPRESS could possibly comply...the broad brush recommendations of Leveson were insufficiently precise.

I am repeatedly asked to comment on the Charter, the PRP...I have my views...I keep them to myself. IPSO, on the other hand, has no view...it is a matter for the press to be persuaded to join a regulator which will seek recognition or to be driven into that position...for some time neither those who joined IPSO nor those nationals who have remained without, the Guardian or FT, have expressed support for this system of charter recognition or for the sticks of cost-shifting.

In the meantime IPSO, whose Articles, in place before we ever came into existence, do not permit an application for recognition under the Charter, acknowledges the need for independent assessment and has commissioned Sir Joseph Pilling, former head of the Northern Ireland Office and the Prison Department, to prepare a report on all aspects of our work, and will do so by September. Whether the report's approval outweighs its criticism will be probably wholly irrelevant to those who already wish to see the IPSO cast down into everlasting torment, long before judgement day.

To them the very notion of persuading the press to engage in a system of regulation constitutes a betrayal of Leveson. That, of course, is not true. The problem is that the report failed to persuade, either parliament which came up with its own solution of a charter, or the press. But what it did achieve, besides exposing the extent and horror of the law-breaking, and prejudicial cruelty or bullying pre-judgment which had been tolerated in press rooms, was persuading the press to enter into a contract.

Effective regulation requires enforceable powers. Enforceable powers require a legally binding contract, conferring powers on the regulator and imposing obligations on the regulated, which are enforceable in court. Absent such a contract, voluntarily entered into by the regulated, there is no way of imposing any system of regulation of the press short of the one system that has not hitherto been advocated, licensing...now which political party will introduce a licensing system which will, no doubt, have to incorporate criminal sanctions for publication without license?

That IPSO is as far as the vast majority of the press has so far been prepared to go is not, for the reasons I have attempted to give, a cause for gloom. We have persuaded those who joined IPSO to agree to some more effective rules than those in place before we ever came into existence, and we are daily providing a means of obtaining correction. But I confess that there are deep-rooted problems that IPSO's system of press regulation has far from resolved.

I asked at the outset what function IPSO served, and whilst I maintain it does what it sets out to do with vigour and dedication, with independent-minded staff, Complaints Committee and Board, it does not solve the deep-rooted problems with which any system of press regulation is beset. It is no longer possible to have a rational debate as to the question of how free should speech be and the equally important question so

vital to any discussion about regulation, how *should* free speech be. It is not possible to have any rational debate about press regulation without considering such regulation in the context of the regulation in the world of internet communication, as Timothy Garton Ash has so completely demonstrated in his essential book *Free Speech*. As of 2015, there are already about three billion internet users...and as Garton Ash demonstrates, by reason of illiteracy that is only about half of mankind. The figure of two billion smartphones in use across the world is projected to reach four billion by 2020.

No-one here does doubt and no-one should doubt Garton Ash's essential thesis that we as individuals need free speech to exercise our own individual sovereignty to make our own judgments, *to make informed choices and participate fully in political life*. And we have not seen the truth of that proposition every day in the dispiriting debate - if that is not doing it too much justice – in the referendum. As Garton Ash points out, in a number of European languages the word for voice and vote is the same. But the free speech the media purports to exercise is no engine for truth unless it is *uncensored, diverse and trustworthy*...it requires the *independence of the fact-finder, the witness and the reporter*. It would be absurd to pretend that IPSO or any regulator can achieve that ideal where *the function of the press is to inform but its role is to make money*. And do not think for one moment there is anything new in this, or believe that the press is worse...Baldwin's celebrated condemnation of the press, power without responsibility, the privilege of the harlot, stemmed from him hearing Beaverbrook announce: *What I want is power. Kiss 'em one day and kick them the next*.

Nor has regulation, still less the law, produced, as yet, any effective solution to a crucial problem that those who assert that the right of free speech permits them to invade privacy in obedience to a claimed right of the public to be informed, fail to acknowledge that so too does the right of free speech include the right to speak privately, to communicate privately, in short, to enter into private relations: *concealment as a condition of civilisation* or, as Garton Ash puts it: *privacy as a condition of free speech*. And just as the press assert a right to be free from control so too the essence of privacy is individual control and choice.

And all of this should be viewed in the context of the internet where even successful attempts to keep private what ought to be private, either in the past, such as Mario Costeja Gonzalez, or for the future, as in the recent Supreme Court case, only lead to even greater dissemination of that which the courts ordered should not be revealed. Regulation does not solve that problem...privacy once lost, unlike reputation, can never be restored, as Max Mosely points out...a correction the following day on the front page "Sorry, it was a Private Orgy" would hardly do the trick.

For every small and halting step we make the problems we encounter in press regulation are problems of world-wide web humanity. It seems to me, proud as I am of those who work at IPSO, to be the height of arrogance to claim that we may solve the problems of mass communication and the height of ignorance to suggest that we should or could...but we should not be deterred from trying to play a part in seeking to provide the protection for freedom of thought and expression, unless we try to do so they will not protect us.